IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT,
DIVISION __
No. B_____

Marcia Spielholz, Debra Petcove and the Wireless Consumers' Alliance

Petitioners,

vs.

The Superior Court of Los Angeles County

Respondent,

Los Angeles Cellular Telephone Company and AT&T Wireless Services, Inc.

Real Parties in Interest.

From the Superior Court For Los Angeles County, Case No. BC186787
Wendell Mortimer, Jr., Judge

PETITION FOR WRIT OF MANDATE OR OTHER EXTRAORDINARY RELIEF; MEMORANDUM OF POINTS AND AUTHORITIES

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Exhibit 5

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PETITION FOR WRIT OF MANDATE OR OTHER EXTRAORDINARY RELIEF; MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Petitioners are plaintiffs whose complaint alleges that Los Angeles Cellular Telephone Company ("LA Cellular"), a prime provider of wireless services in Southern California, has engaged in a decade-long false and deceptive advertising campaign. LA Cellular advertises that it offers a "seamless calling area" throughout Southern California. The complaint alleges that these advertisements are inaccurate, misleading and intentionally deceptive because there are substantial undisclosed coverage gaps, holes or "dead zones" in LA Cellular's service area. If an LA Cellular

subscriber attempts to place a call in a coverage gap, the call will not be connected. LA Cellular has knowingly failed to disclose the existence of these coverage gaps to its consumers, many of which subscribed to LA Cellular for safety reasons and some of whom, as in the case of Plaintiff Marcia Spielholz, suffered grave injuries when their emergency 9-1-1 calls could not be connected.

The issue raised in this petition is whether California consumers' may assert, without limitation, state law claims that have as their remedy monetary relief against a wireless telephone company arising from its false advertising, or whether such monetary relief is preempted by the Federal Communications Act ("FCA"). Section 332(c)(3)(A) of the FCA bars states from regulating the *rates* charged by wireless telephone companies, but preserves other forms of regulation. Even though § 332 — as reflected in the language of the statute itself as well as its legislative history and subsequent interpretations by the courts and the Federal Communication Commission ("FCC") — preserves false advertising and consumer protection claims *and* the monetary relief permitted under these claims, the trial court struck all of plaintiffs' requests for compensatory and punitive damages and restitution. It concluded that the award of any form of monetary relief would require it to "regulate rates" within the meaning of § 332.

In 1993, Congress enacted § 332(c)(3)(A) as part of legislation amending the FCA to promote competition within the wireless communications industry by, inter alia, providing that rates for wireless telephone services were to be governed solely by the economic forces of the free marketplace. Section 332(c)(3)(A) serves this purpose by barring states, many of which previously regulated rates for intrastate wireless services, from setting the rates charged for such services. Awarding

damages based upon a judicial determination of false and deceptive advertising by a wireless telephone company, however, does not constitute rate regulation in conflict with § 332(c)(3)(A). To the contrary, judicial oversight of the advertising practices of the wireless telephone industry reinforces § 332's objective of fostering competition and economic growth. Companies that gain market share by means of false advertising harm consumers and gain an unfair advantage over their competitors, thereby undermining free and full market competition and depriving consumers of the benefits that flow from such competition in the long run.

The trial court's orders effectively immunize wireless telephone companies from any and all liability for past damages, restitution or exemplary damages. As the California Supreme Court has explained, an injunction against future misconduct,

> while of some deterrent force, is only a partial remedy since it does not correct the consequences of past conduct. To permit the (retention of even) a portion of the illicit profits, would impair the full impact of the deterrent force that is essential if adequate enforcement (of the law) is be achieved.

Fletcher v. Security Pacific Nat'l Bank, 23 Cal. 3d 442, 451 (1979), quoting SEC v. Golconda Mining Co., 327 F. Supp. 257, 259-260 (S.D. N.Y. 1971).

Hence, the outcome of this petition is of substantial significance to California consumers, who constitute the largest group of wireless users in the nation, and is one of first impression for any California appellate court. If permitted to stand, the trial court's reasoning will eviscerate consumer protections afforded California residents as against the wireless telephone industry. No matter how egregious its conduct or whether the plaintiff is a private citizen or the Attorney General bringing an action on behalf of the People of the State of California, the wireless

telephone industry will be shielded from all claims for monetary relief. Rather than fostering competition within the industry and allowing marketplace forces to curb anticompetitive practices by wireless telephone companies, the trial court has gravely undermined California statutory and common laws claims and their remedies designed to inhibit such practices. Absent the issuance of a writ of mandate, wireless carriers may conclude that they are free to disseminate false and deceptive advertising and engage in anticompetitive conduct without fear of any effective legal reprisal.

PETITION FOR WRIT OF MANDATE OR OTHER EXTRAORDINARY RELIEF

Petitioners Marcia Spielholz, Debra Petcove and the Wireless Consumers' Alliance hereby petition this Court for a Writ of Mandate of Other Extraordinary Relief to the Respondent Superior Court of the State of California for the County of Los Angeles, and by this Verified Petition allege:

1. All exhibits accompanying this petition are true copies of original documents on file with trial court, except exhibits at Tabs 9 and 18, which are true copies of the original reporters' transcripts of hearings on February 11, 1999 and March 16, 1999, before the trial court. The exhibits are incorporated herein by reference as though fully set forth in this petition. Page references are to the internal pagination of each exhibit.

2. Marcia Spielholz, Debra Petcove and the Wireless Consumers' Alliance ("the Alliance") are the plaintiffs in an action now pending in trial court entitled Marcia Spielholz, *et al.* v. Los Angeles Cellular Telephone Company, *et al.*, Case No. BC186787.

3. As set forth in the Second Amended Complaint, the operative underlying complaint filed on December 14, 1998, Spielholz subscribed to wireless telephone service provided by defendant LA Cellular. On December 4, 1994, Spielholz was attacked in her car and shot in the face and neck while attempting unsuccessfully to connect to 9-1-1 through LA Cellular's service because she was traveling in an area that had an undisclosed coverage gap, hole or "dead zone."

4. Petcove is an LA Cellular subscriber who alleges she regularly travels through an area near her home that falls within an undisclosed coverage gap in LA Cellular's service area. The Alliance is a California non-profit public benefit corporation which has been organized

to improve public access to emergency services through wireless telephone communications.

5. The defendants are LA Cellular, AT&T Wireless Services, Inc. ("AT&T Wireless"), and BellSouth Cellular Corporation ("BellSouth Cellular"). Plaintiffs allege LA Cellular is a California partnership, and its general partners and/or joint venturers are defendants BellSouth Cellular and AT&T Wireless.[1/] AT&T Wireless is a Delaware corporation, with headquarters in Kirkland, Washington. BellSouth Cellular is a Georgia corporation, with headquarters in Atlanta, Georgia. BellSouth Cellular contests jurisdiction, and has not appeared in the action. Accordingly, the Real Parties in Interest are LA Cellular and AT&T Wireless.

6. Plaintiffs allege that LA Cellular, together with its joint venturers and/or general partners, defendants BellSouth Cellular Corporation and AT&T Wireless, provide wireless radio service to consumers in Los Angeles and surrounding cities and counties. In widely-distributed advertisements, LA Cellular touted as its most important advantage a seamless calling area in excess of 30,000 square miles "*from anywhere between the Nevada and Arizona borders to Catalina Island.*" Tab 2, at 1, ¶ 1 (emphasis added).

7. Plaintiffs allege that LA Cellular's representations about its calling area are inaccurate, misleading and intentionally deceptive because there are undisclosed gaps, holes or "dead zones" in LA Cellular's advertised coverage area. If an LA Cellular subscriber attempts to place a call in an area which falls within one of these gaps, the call will not be

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[1/]Counsel for LA Cellular informed plaintiffs on February 12, 1999 that LA Cellular is no longer a partnership. LA Cellular is now known as AB Cellular Holding, LLC, a limited liability company organized under Delaware law and doing business in California as AT&T Wireless Services.

connected. Knowing of the gaps in coverage in its advertised service area, LA Cellular has, nevertheless, failed to disclose the existence of these gaps to consumers. Tab 2, at 1, ¶ 2.

8. Plaintiffs further allege that LA Cellular's representations about its calling area are inaccurate, misleading and intentionally deceptive because LA Cellular is aware that its system lacks the capacity to provide the seamless calling area it advertises, even where a gap or "dead zone" does not exist. The effective calling area of LA Cellular is limited to locations in which LA Cellular has designed its system, invested resources and installed equipment to provide access to its service. These locations in the effective calling area generate the greatest profit potential for LA Cellular. In other areas, LA Cellular has not invested sufficient resources and equipment, knowing that subscribers will, as a practical matter, be precluded from accessing its service. Tab 2, at 1-2, ¶ 3.

9. The Second Amended Complaint sets forth six claims against all defendants:

(a) violation of Business and Professions Code §§ 17200, et seq.: for defendants' acts of continuing to knowingly disseminate in its advertisements unfair, deceptive, untrue, or misleading statements about the cellular telephones they sell, their coverage area and other conditions of their cellular service, with the knowledge that service subscribers would be unable to obtain the advertised benefits of defendants' service, is a practice which constitutes fraud, deceit and false advertising, in violation of Business and Professions Code §§ 17200, et seq. and §§ 17500, et seq.;

(b) violation of Business & Professions Code §§ 17500, et seq., for defendants' misleading and untrue statements made

with the intent to sell their services and equipment to plaintiffs and all others similarly situated;

(c) violation of the Consumers Legal Remedies Act ("CLRA"), Civil Code §§ 1750, et seq., for defendants' deceptive practices, unlawful methods of competition, false advertising and/or proscribed acts as defined in the CLRA, specifically Civil Code § 1770(a)(5) (defendants' acts and practices constitute misrepresentations that the cellular service in question has characteristics, uses and/or benefits which it does not have), Civil Code § 1770(a)(7) (defendants have engaged in deceptive, untrue and/or misleading advertising that their cellular service is of a particular standard, quality, or grade, when it is of another), Civil Code § 1770(a)(9) (defendants advertised their cellular service with the intent not to sell it as advertised or represented), and Civil Code § 1770(a)(14) (defendants have misrepresented that a transaction confers or involves legal rights, obligations, or remedies upon plaintiffs and members of the class regarding the provision of cellular service, when it does not);

(d) fraud and deceit: for (i) defendants' uniform misrepresentations to plaintiffs and the class that defendants' advertised calling area was seamless and that its system could be accessed anywhere by wireless phones sold and provided by defendants and their agents, when, in fact, defendants knew such representations were false; and
(ii) defendants' intentional failure to disclose to plaintiffs and the class that defendants' calling area was not seamless as advertised and could not be accessed anywhere by wireless phones sold and provided by defendants and their agents;

(e) negligent misrepresentation: for defendants' failure to fulfill their duty to disclose to plaintiffs and the class the material facts discussed herein;

(f) breach of contract; and for

(g) breach of the implied covenant of good faith and fair dealing.[2/]

10. Spielholz and Petcove assert all claims against all defendants and seek class certification of all claims. The Alliance asserts its claims under Bus. & Prof. Code §§ 17200, et seq., and Bus. & Prof. Code §§ 17500, et seq., on behalf of the general public. Tab 2, at 3, ¶ 6.

11. On January 19, 1999, defendants LA Cellular and AT&T Wireless moved to strike plaintiffs' claims for monetary relief on the grounds that claims that had as their remedy monetary relief are preempted by 47 U.S.C. § 332(c)(3)(A) of the Federal Communications Act ("FCA"). Tab 4, at 3.

12. Section 332(c)(3)(A) solely precludes state regulation of the rates charged by wireless telephone service providers and entry into the market for wireless telephone services:

> . . . no State or local government shall have any authority to regulate the entry of *or the rates charged by* any commercial mobile service [which includes cellular telephone companies] or any private mobile service, except that this paragraph shall not prohibit a State *from regulating the other terms and conditions of commercial mobile services.*

47 U.S.C. § 332(c)(3)(A) (emphasis added).

13. Plaintiffs filed their opposition to the motion to strike on February 2, 1999, arguing that (a) the language of § 332, itself, excluded plaintiffs' claims from those that may be preempted; (b) the "savings clause" of the FCA found at 47 U.S.C. § 414 preserved plaintiffs' rights to assert

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[2/]Plaintiffs intend to move to dismiss these final two claims, and, accordingly, do not challenge any error committed by the trial court with respect to these claims.

such claims; and (c) that virtually all courts, including Tenore v. A T &T Wireless Services, 136 Wash. 2d 322, 962 P.2d 104 (1998), cert. denied, 119 S. Ct. 1096 (Feb. 22, 1999), that have analyzed whether state law claims for false advertising are preempted by the Federal Communications Act have concluded that they are not preempted. Tab 5, at 5-9.

14. LA Cellular and AT&T Wireless argued in their reply brief filed February 9, 1999, that the Washington Supreme Court's holding in Tenore was in error and should not be followed because a petition for writ of certiorari was then pending before the United States Supreme Court. Tab 7, at 6 n.4. LA Cellular and AT&T Wireless even requested judicial notice of the petition for writ of certiorari, and forwarded a copy of the petition to the trial court. Tab 7. On February 11, 1999, during oral argument on the motion to strike, counsel for LA Cellular and AT&T Wireless repeated this argument. Tab 9, at 17.

15. On February 11, 1999, the trial court issued a minute order that provided:

> Motion granted. Plaintiff's allegations as to monetary damages violate the preemptive mandate of Section 332 of the Federal Communications Act. The second amended complaint recovery allegations would require the state court to regulate or adjust rates which is prohibited by Section 332.

Tab 10.

16. On February 22, 1999, plaintiffs moved for clarification and reconsideration of the trial court's February 11, 1999 order.

17. Plaintiffs sought clarification of the order because the trial court's reference to "recovery allegations" was imprecise. The language of the trial court's order suggested that plaintiffs' claims for

compensatory damages had been stricken, but was not clear as to whether plaintiffs could seek remedies other than compensatory damages, namely, (1) restitution under Bus. & Prof. Code §§ 17200, et seq. and Bus. & Prof. Code §§ 17500, et seq.; and (2) punitive damages under their common law fraud claim and for violation of the of CLRA, Civil Code §§ 1750, et seq. Tab 12, at 1. Plaintiffs also sought reconsideration of the order because following its issuance, the United States Supreme Court denied AT&T Wireless' petition for writ of certiorari in Tenore. Tab 12, at 2.

18. On March 9, 1999, LA Cellular and AT&T Wireless filed their opposition to plaintiffs' motion for clarification and reconsideration. As in their motion to strike, LA Cellular and AT&T Wireless asserted that any award of monetary relief to plaintiffs, whether for compensatory damages, restitution, or punitive damages, would require the trial court to "enmesh" itself in impermissible rate regulation. Tab 14, at 5.

19. On March 16, 1999, the trial court heard oral argument on plaintiffs' motion for clarification and reconsideration. The same day, the trial court issued a minute order that provided:

> Motion is argued and denied. A motion for reconsideration (Code of Civil Procedure Section 1008) requires new or different facts, circumstances or law, which is not present here. The previous ruling was unambiguous and does not require "clarification."

Tab 19.

20. The principal issue presented by this petition is whether 47 U.S.C. § 322(c)(3)(A) preempts statutory and/or common law claims stemming from a wireless telephone company's false advertising that have as their remedy monetary relief, including compensatory and punitive

damages and restitution. The trial court concluded that any form of monetary relief was preempted by the FCA.

21. The trial court committed error. Section 332 solely preempts state regulation of "the rates charged" (or entry into the market) by wireless telephone providers. Plaintiffs do not seek to "prescribe, set or fix" LA Cellular's rates, the FCC's standard for evaluating whether a state regulation conflicts with § 332(c)(3)(A). See In re Pittencrieff Comms., 13 F.C.C.R. 1735, 1745 (1997), aff'd sub nom., Cellular Telecomms. Ind. Ass'n v. FCC, 168 F.3d 1332, 1336 (D.C. Cir. 1999).

22. The legislative history of Section 332 unambiguously demonstrates that Congress intended to *exclude* state consumer protection statutes from the preemptive reach of § 332(c)(3(A). H.R. Rep. No. 103-111, 103rd Cong., 1st Sess. 211, 261, reprinted in 1993 U.S.C.C.A.N. 378, 588. With the exception of one criticized federal authority, every federal and state court that has analyzed § 332(c)(3)(A), its legislative history, and its relationship with the "savings clause" of the FCA, has rejected the expansive interpretation of the preemptive scope of § 322(c)(3)(A) advanced by the defendants and adopted by the trial court.

23. No immediate appeal lies when only a portion of a pleading is stricken. Civ. Proc. Code § 472c(b)(3); § 904.1. Review by extraordinary relief is appropriate since this petition presents issues of statewide, compelling interest and a question of first impression for California courts. See Smith v. Superior Court, 41 Cal. App. 4th 1014, 1020 (1996). Resolution of the issue raised by this petition will have widespread consequences for California consumers of wireless telephone services. In particular, this Court must determine whether wireless telephone providers are immunized from the full range of remedies provided under California common law and statutes enacted for the benefit

of consumers against companies that engage in false and deceptive advertising.

24. If the trial court's orders are not reversed, plaintiffs will be irreparably injured. The trial court has effectively deprived plaintiffs of the ability to plead, and prove, a substantial portion of their claims. See Brandt v. Superior Court, 37 Cal. 3d 813, 816 (1985); Vasquez v. Superior Court, 4 Cal. 3d 800, 807 (1971). Even if plaintiffs were to prevail at trial and the trial court issued an injunction, plaintiffs will be compelled to file an appeal to seek a second trial on their claims for compensatory damages, restitution and punitive damages. If the trial court was found to have committed error, then an expensive second trial, most likely after further discovery, would be required, wasting already overtaxed judicial resources. See Barrett v. Superior Court, 222 Cal. App. 3d 1176, 1183 (1990); Coulter v. Superior Court, 21 Cal. 3d 144, 148 (1978).

25. The trial court's orders are in direct conflict with all of the decisions from other jurisdictions that have been called upon to decide this precise issue, save one.[3/] The unanimous decision of the Washington Supreme Court in Tenore v. A T &T Wireless Services, 136 Wash. 2d 322, 962 P.2d 104 (1998), cert. denied 119 S. Ct. 1096 (Feb. 22, 1999), is the most recent example of these authorities. Plaintiffs seek to invoke under California law the same consumer protections that consumers of wireless telephone services in other jurisdictions have been afforded. See generally Greyhound Corp. v. Superior Court, 56 Cal. 2d 355, 378 (1961) (conflicting interpretations of law require a resolution by writ).

[3/] See In re Comcast Cellular Telecom. Litigation, 949 F. Supp. 1193 (E.D. Pa. 1996). As discussed infra, at 41-43, this decision is both distinguishable and its holding has been rejected in two companion cases.

WHEREFORE, Marcia Spielholz, Debra Petcove and the Wireless Consumers' Alliance, Inc., pray that this Court:

1. Issue a Peremptory Writ of mandate commanding the trial court to vacate its order striking portions of plaintiffs' Second Amended Complaint;
2. In the alternative, issue an Alternative Writ of Mandate directing the trial court to show cause why it should not be so directed, and upon return to the Alternative Writ, issue a Peremptory Writ as set forth above;
3. Award plaintiffs their fees and costs and such other relief as may be deemed just and proper.

DATED: May 6, 1999

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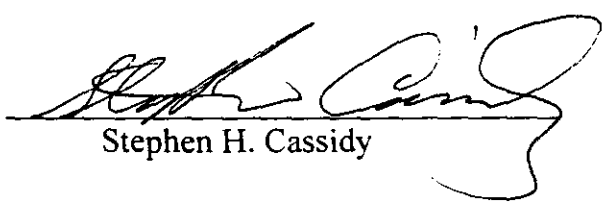
VERIFICATION

I, Stephen H. Cassidy, declare:

I am associated with the law firm of Lieff, Cabraser, Heimann & Bernstein, LLP, attorneys for Marcia Spielholz, Debra Petcove and the Wireless Consumers' Alliance, Inc., petitioners in this action. I have personally reviewed and am familiar with the records, files and proceedings described in the foregoing Petition for Writ of Mandate or Other Extraordinary Relief, and know the contents thereof to be true of my own personal knowledge.

I declare under penalty of perjury that the foregoing is true and correct and that this verification was executed on May 6, 1999, at San Francisco, California.



Stephen H. Cassidy

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF MANDATE OR OTHER EXTRAORDINARY RELIEF

I. SUMMARY OF ARGUMENT

Does federal law preempt a state court from awarding monetary relief for false advertising and fraud by a wireless phone company? By answering "no" to this question of first impression in California, this Court will concur with existing authority and reject the trial court's weakening of judicially-enforced consumer protections for wireless phone users.

Plaintiffs allege that defendants LA Cellular and AT&T Wireless deliberately misrepresented and failed to disclose the existence of extensive coverage gaps within LA Cellular's advertised service area. Plaintiffs have pled claims for false advertising (Bus. & Prof. Code §§ 17500, et seq.), unfair competition (Bus. & Prof. Code §§ 17200, et seq.), violation of the Consumer Legal Remedies Act (Civil Code §§ 1750, et seq.), common law fraud, and negligent misrepresentation.[1/] They seek an injunction preventing defendants from making false representations to consumers to sell its services and restitution of all ill-gotten profits, as well as compensatory and punitive damages.

The trial court struck all of plaintiffs' claims for monetary relief, determining that any award of monetary relief would involve the court in "rate regulation," and intrude on the FCC's jurisdiction in conflict with 47 U.S.C. § 332(c)(3)(A). Section 332(c)(3)(A) provides:

> . . . no State or local government shall have any authority to regulate the entry of *or the rates charged by* any commercial mobile service

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[1/] Plaintiffs also alleged claims for breach of contract and breach of the implied covenant of good faith and fair dealing, but intend to dismiss these claims.

> [which include cellular telephone companies] or any private mobile service, except that this paragraph shall not prohibit a State *from regulating the other terms and conditions of commercial mobile services.*

(Emphasis added).

In 1993, Congress amended § 332 to promote the growth and development of the wireless telephone industry by removing regulatory restraints, including rate regulation by federal and state bodies, and substituting the free market as the arbitrator of reasonable wireless rates. H.R. Rep. No. 103-111, 103rd Cong., 1st Sess. 211, 260, reprinted in 1993 U.S.C.C.A.N. 378, 587. Today, wireless phone service prices are determined by market forces, not the rate setting process that regulates land line phone service. Neither the concept nor the practice of rate setting applies to wireless phone service.

An award of monetary relief against defendants in this action will not require the trial court to engage rate-setting. Plaintiffs make no allegations concerning the prices charged for wireless service. Nor have plaintiffs sought any order "prescribing, setting or fixing" LA Cellular's rates, the standard established by the FCC for determining whether state regulation falls within the preemptive scope of § 332(c)(3)(A). In re Pittencrieff Comms., 13 F.C.C.R. 1735, 1745 (1997), aff'd. sub nom., Cellular Telecomms. Ind. Ass'n v. FCC, 168 F.3d 1332 (D.C. Cir. 1999).

Instead, an award of monetary relief for false and deceptive advertising, and specifically restitution provided under Bus. & Prof. Code § 17203 and § 17535, uniquely fosters the growth of the wireless industry by deterring unfair competition that harms consumers and undermines free and fair competition. See Fletcher v. Security Pacific Nat'l Bank, 23 Cal. 3d 442, 451 (1979) (injunctive relief alone is insufficient to achieve full enforcement of the Unfair Competition Law).

The trial court's reasoning, severely restricting state judicial review of the business practices of the wireless telephone industry, *is directly contrary to Congress' intent*. Congress deliberately and unequivocally excluded state consumer protection laws from the preemptive reach of § 332(c)(3)(A):

> It is the intent of the Committee that the states still would be able to regulate the terms and conditions of these services. By 'terms and conditions,' the Committee intends to include such matters as customer billing information and practices and billing disputes and other *consumer protection matters*. . . .This list is intended to be illustrative only *and not meant to preclude other matters* generally understood to fall under 'terms and conditions.'

H.R. Rep. No. 103-111, 103rd Cong., 1st Sess. 211, 261, reprinted in 1993 U.S.C.C.A.N. 378, 588 (emphasis added).

All of the courts that have been called upon to decide the issue, except one court, have upheld state law claims against telecommunications providers for false and deceptive advertising and rejected the trial court's interpretation of § 332. Recently, the Washington Supreme Court unanimously concluded that state law claims, and their concomitant monetary relief, are *not preempted* by § 332. Tenore v. AT&T Wireless Services, 136 Wash. 2d 322, 962 P.2d 104 (1998), cert. denied, 119 S. Ct. 1096 (Feb. 22, 1999). Monetary remedies awarded as relief for false and deceptive advertising are simply a cost of doing business in a legally proscribed manner. Here, liability and the calculation of the monetary remedy are legally distinct from the price charged for wireless phone service.

II. THE TRIAL COURT'S ORDERS STRIKING ALL FORMS OF MONETARY RELIEF MUST BE REVIEWED BY AN IMMEDIATE WRIT

A. The Issue Of The Preemptive Scope Of 47 U.S.C. § 332(c)(3)(A) Is A Matter Of Statewide, Public Importance And Of First Impression.

"[T]he importance of the issue presented has been repeatedly deemed sufficient to justify writ review." Smith v. Superior Court, 41 Cal. App. 4th 1014, 1020 (1996).[5/] Whether California consumers of wireless telephone services may have available to them the remedies for false advertising provided under California law is a compelling question, and one of first impression for California courts.

The use of wireless telephones is pervasive and growing. As noted recently in Wireless Week, "[l]ess than 15 years ago, few consumers had even heard of the term 'cellular phone.' Not two decades later, millions of consumers nationwide depend on wireless service." R. Jackson, "Let's Avoid Misleading Messages," Wireless Week, Mar. 1, 1999; Tab 17, Exh. C.

The need for state judicial oversight of the advertising practices of wireless telephone companies extends beyond the parties to this litigation. In a leading trade magazine, an industry consultant warned the wireless industry less than two months ago against employing deceptive advertisements related to service area coverage:

[5/] See also Brandt v. Superior Court, 37 Cal. 3d 813, 816 (1985) (issue of widespread importance); Williamson v. Superior Court, 21 Cal. 3d 829, 833 (1978); Elden v. Superior Court, 53 Cal. App. 4th 1497, 1504 (1997) (novel issue of law); Stermer v. Superior Court, 20 Cal. App. 4th 777, 779-780, fn.1 (1993); Bruno v. Superior Court, 127 Cal. App. 3d 120, 122 (1981) (issue previously undecided).

> Some wireless companies describe their coverage as "nationwide" to spark consumer interest. While industry insiders and certain "in the know" consumers may understand this description to mean that the service provider owns wireless licenses throughout the nation, many consumers expect that service described as "nationwide" will be seamlessly available across the United States. Accordingly, they are shocked (even angered) when they realize that *little or no coverage is currently available in major cities* like Chicago or Dallas . . .

Id. (emphasis added).

The trial court's orders would appear to suggest that all claims for monetary relief as against a wireless telephone company would be barred, including, for example, civil penalties sought by the Attorney General of State of California and other public prosecuting entities under Bus. & Prof. Code § 17206 & § 17536. That result is precisely *the opposite end* Congress sought to achieve by enacting § 332. H.R. Rep. No. 103-111, 103rd Cong., 1st Sess. 211, 261, reprinted in 1993 U.S.C.C.A.N. 378, 588.

B. Absent Immediate Review, Plaintiffs Will Suffer An Irreparable Injury.

California appellate courts have frequently issued writs of mandate reversing orders granting defendant's motions to strike. See Brandt, 37 Cal. 3d at 820 (reversing order striking portions of complaint seeking attorney's fees); Bruno, 127 Cal. App. 3d at 135 (reversing order striking remedies of "fluid class recovery" or "cy pres"); Blegen v. Superior Court, 125 Cal. App. 3d 959 (1981) (reversing order striking claim for punitive damages); Perkins v. Superior Court, 117 Cal. App. 3d 1 (1981) (same).

Mandamus is appropriate when "the trial court's ruling has effectively deprived petitioner of the opportunity to present a substantial portion" of his or her cause of action, and extraordinary relief may prevent a needless and expensive trial and reversal. Brandt, 37 Cal. 3d at 816. See also Taylor v. Superior Court, 24 Cal. 3d 809, 894 (1979); Smith, 41 Cal. App. 4th at 1420; Blegen, 125 Cal. App. 3d at 963.

The trial court has deprived plaintiffs of the opportunity to present their claims for compensatory damages, restitution and/or punitive damages. This error is not subject to cure prior to trial, as plaintiffs' motion for clarification and reconsideration was denied on March 16, 1999, and will have a profound effect upon the outcome of the trial. See Omaha Indemnity Co. v. Superior Court, 209 Cal. App. 3d 1266, 1273 (1989).

Even if plaintiffs prevail upon all of their claims at trial, they will be compelled to file an appeal and seek a new trial to obtain monetary relief. Extraordinary relief is justified because "a second trial would be required, with the attendant waste of judicial resources," if the trial court's orders are erroneous. Barrett v. Superior Court, 222 Cal. App. 3d 1176, 1183 (1990).

C. Immediate Review Is Necessary To Provide Californians The Same Protections Afforded Consumers Of Wireless Telephone Subscribers In Other States.

Virtually all authorities that have analyzed § 332 have rejected the trial court's expansive interpretation of its preemptive scope.[6/] Most recently, in Tenore v. A T &T Wireless Services, Inc., 136 Wash. 2d

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[6/] Just as intra-state conflicts in the law justify extraordinary review, Greyhound Corp. v. Superior Court, 56 Cal. 2d 355, 378 (1961), permitting Californians to assert the same claims and seek the same remedies upheld by courts nationwide should likewise serve as a basis for immediate review.

322, 962 P.2d 104 (1998), cert. denied, 119 S. Ct. 1096 (Feb. 22, 1999), the Washington Supreme Court reversed the trial court's dismissal on preemption grounds under § 332(c)(3)(A) of state law claims arising from AT&T Wireless' failure to disclose its billing practice of "rounding up" charges to the next full minute. Thus, in a case arising from a wireless company's alleged false advertising in which defendant AT&T Wireless advanced *the identical preemption argument* as it and LA Cellular argued before the trial court below, the Washington Supreme Court unanimously held:

> The language of Section 332 itself, contained in the 'terms and conditions' clause, limits the preemptive reach of that provision. . . .A court may award damages [for false and deceptive advertising] without it constituting rate making.

136 Wash. 2d at 349, 962 P.2d at 117. See also Sanderson v. AWACS, 958 F. Supp. 947 (D. Del. 1997) (wireless telephone company's assertion that § 332(c)(3)(A) requires removal from state court of claims under state law based on false advertising concerning billing practices rejected); DeCastro v. AWACS, 935 F. Supp. 541, 552 (D.N.J. 1996) (state claims arising from failure to disclose billing practices "are challenging the fairness of a billing practice, not the rates themselves" and, therefore, do not conflict with § 332(a)(3)(A)); Bennett v. Alltel Mobile Communications, 1996 WL 1054301 (M.D. Ala. 1996) (state false advertising claim challenging failure to disclose practice of "rounding up" is not a challenge

to the rate charged in violation of § 332(c)(3)(A)).[7/] But see In re Comcast Cellular Telecom. Litigation, 949 F. Supp. 1193 (E.D. Pa. 1996).[8/]

On February 22, 1999, the United States Supreme Court denied AT&T Wireless' petition for writ of certiorari in Tenore. Across the nation, commentators observed that the U.S. Supreme Court's action signaled that state law claims of false advertising against the wireless telephone industry are not preempted by Federal law:

> The high court's refusal to hear the case means the state court can proceed to the central question of whether AT&T [Wireless Services] has misled its customers through its billing practices. It also opens AT&T [Wireless

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[7/] The following cases, although not involving claims of false advertising, narrowly interpreted the preemptive scope of § 332 and upheld the state regulation at issue: Cellular Telecomms. Ind. Ass'n v. FCC, 168 F.3d 1332, 1336 (D.C. Cir. 1999) (state law requiring wireless telephone companies to contribute to state-administered universal service funds did not constitute rate regulation under § 332); GTE Mobilenet of Ohio v. Johnson, 111 F.3d 469, 479 (6th Cir. 1999) (state law barring anti-competitive conduct within the wireless telephone industry not preempted by § 332); Mountain Solutions v. State Corp. Comn'n, 966 F. Supp. 1043, 1048 (D. Kan. 1997) (§ 332(c)(3)(A) exists in harmony with other state regulation, including regulation that may require rates to increase "as costs are passed on to customers"); Esquivel v. Southwestern Bell Mobile Sys., 920 F. Supp. 713, 716 (S.D. Tex. 1996) (concluding that a billing practice of charging liquidated damages for early termination of service is a "term and condition" of the agreement, rather than a rate, and therefore may be regulated by the state and is not completely preempted by § 332(c)(3)(A)).

[8/] Comcast held that state law claims for breach of the implied duty of good faith and fair dealing and unjust enrichment related to billing practices were, in substance, a challenge to the rates themselves and, therefore, preempted by § 332. 949 F.Supp at 1203. As discussed infra, at 42-43, Sanderson and DeCastro, two companion cases to Comcast, rejected this portion of Comcast's holding. Further, Comcast found that plaintiffs' claim under Pennsylvania's Unfair Trade Practices and Consumer Protection Law did *not* present a challenge to rates themselves, and was not preempted by § 332. Id. at 1200.

> Services] and other wireless companies to pending and future suits in other states.

M. Mills, "Cell-Phone Billing Suit To Proceed; High Court Doesn't Halt Rounding Case," Washington Post, Feb. 23, 1999; Tab 17, Exh. A.

III. CLAIMS FOR MONETARY RELIEF ARISING FROM FALSE ADVERTISING IN VIOLATION OF STATE LAW ARE NOT PREEMPTED BY THE FEDERAL COMMUNICATIONS ACT

A. Standard of Review and Rules of Interpretation.

Upon determining that mandamus is appropriate, when reviewing an order on the pleadings, all material facts alleged are treated as true and the Court's review is de novo. North American Chemical Co. v. Superior Court, 59 Cal. App. 4th 764, 773 (1997).

Whether federal law preempts state law turns on Congress' intent in enacting the regulatory scheme at issue. Cipollone v. Liggett Group, 505 U.S. 504, 516 (1992). Where, as here, a federal statute contains an express preemption clause, state law claims are not preempted unless clearly mandated by the statute. Id. at 517. Similarly, the California Supreme Court has directed that federal preemption statutes must be interpreted narrowly in order to preserve the state's historic police powers. Mangini v. R.J. Reynolds Tobacco Co., 7 Cal. 4th 1057, 1072 (1994).

B. The Trial Court Erred In Finding That Petitioners' Claims For Monetary Relief Are Preempted By The Federal Communications Act.

1. Section 332(c)(3)(A) Preserves Plaintiffs' State Law Claims and Remedies.

In 1993, Congress revolutionized the statutory scheme for regulating the wireless telephone industry. As part of the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312 (1993)

(codified in relevant part at 47 U.S.C. § 332), Congress "gave the FCC authority to specify that certain types of federal regulation, including tariff filing requirements, would be inapplicable" to wireless telephone companies. Connecticut Dep't of Public Utility Control v. FCC, 78 F.3d 842, 846 n.1 (2d Cir. 1996). Subsequently, the FCC exempted the wireless telephone industry from any tariff filing requirements, leaving the reasonableness of rates to be determined by market competition. Implementation of Sections 3(n) and 332 of the Communications Act ("Implementation Order"), 9 F.C.C.R. 1411, ¶16 (1994).

In order to preclude any state or local agency from usurping the FCC's authority to decide how best to promote market competition, Congress barred state and local governments from regulating the market entry and setting of wireless telephone rates.[9/] Title 47 U.S.C. § 332(c)(3)(A) provides:

> . . . no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service [defined to include cellular telephone companies] or any private mobile service, *except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services.*

(Emphasis added).

As the Sixth Circuit has observed, "[o]n its face, the preemptive reach of section 332 is limited. The statute preempts states

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[9/] For example, pursuant to § 234 of the California Public Utilities Code, the California Public Utilities Commission ("CPUC") was accorded the authority to regulate LA Cellular's intrastate rates prior to the implementation of § 332. See In the Matter of Petition of the Public Utilities Commission of the State of California to Retain Regulatory Authority Over Intrastate Cellular Services Rates, 11 F.C.C.R. 796 (1995).

from regulating market entry and rates charged, but specifically allows states to regulate 'other terms and conditions' of service." GTE Mobilnet of Ohio, 111 F.3d at 477. See Mountain Solutions, 966 F. Supp at 1048 (§ 332(c)(3)(A) "specifically authorizes [states] to regulate 'other terms and conditions' of service."). The "other terms and conditions" set forth in § 332(c)(3)(A) include a wireless telephone providers' advertising. Tenore, 136 Wash. 2d at 337, 962 P.2d at 111. See DeCastro, 935 F.Supp. at 551.

The legislative record leaves no doubt that Congress did not intend that § 332(c)(3)(A) preempt state regulation of a wireless telephone provider's advertising practices:

> It is the intent of the Committee that the states still would be able to regulate the terms and conditions of these services. By 'terms and conditions,' *the Committee intends to include such matters as customer billing information and practices and billing disputes and other consumer protection matters.* . . .This list is intended to be *illustrative only* and not meant to preclude other matters generally understood to fall under 'terms and conditions.'

H.R. Rep. No. 103-111, 103rd Cong., 1st Sess. 211, 261, reprinted in 1993 U.S.C.C.A.N. 378, 588 (emphasis added).

The FCC has interpreted "the rates charged" phrase of § 332(c)(3)(A) "to prohibit states from prescribing, setting, fixing rates for a [wireless] operator." In re Pittencrieff Comms., 13 F.C.C.R. 1735, 1745 (1997), aff'd sub nom., Cellular Telecomms. Ind. Ass'n v. FCC, 168 F.3d 1332, 1336 (D.C. Cir. 1999). Section 332(c)(3)(A) only preempts state law that directly regulates rates. While state laws may indirectly affect the rates charged by wireless telephone carriers, this is not sufficient for preemption. Stated another way, § 332 does not preempt "state authority over matters

that may have an impact on the costs of doing business for a CMRS operator." Id. at 1745. See Mountain Solutions, 966 F. Supp at 1048 ("Complying with these 'terms and conditions' necessarily entails the expending of significant financial capital.")

That § 322 does not preempt plaintiffs' claims is supported by the "savings clause" of the FCA. Title 47 U.S.C. § 414 provides:

> [N]othing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.

The savings clause "clearly reflects Congress's determination that state law causes of action should not be subsumed by the Act, but remain as independent causes of action." Sanderson, 958 F. Supp. at 958. This interpretation of the savings clause has been overwhelmingly adopted by other courts. DeCastro, 935 F. Supp. at 551 ("Many courts have relied upon this savings clause to find that Congress intended to preserve state law claims for breach of duties which are distinguishable from duties created by the Act."), citing KVHP TV Partners v. Channel 12 of Beaumont, 874 F. Supp. 756, 761 (E.D. Tex. 1995) ("The inclusion of this savings clause is plainly inconsistent with the congressional displacement of state contract and fraud claims.").[10/]

[10/] See also Weinberg v. Sprint Corp., 165 F.R.D. 431, 440 (1996) (saving clause preserves state law claims for fraud, negligent misrepresentation and consumer fraud related to telecommunications company's advertising promotions); Heichman v. AT&T, 943 F. Supp. 1212, 1220-21 (C.D. Cal. 1995) (claim under California's Unfair Business Practices Act against telecommunications company properly brought as state cause of action); Commonwealth of Kentucky v. Comcast Cable of Paducah, 991 F. Supp. 285 (W.D. Ky. 1995) (state claim under consumer fraud statute alleging unlawful practice of billing customers for certain services not pre-empted by the FCA); Cooperative Comms. v. AT&T Corp., 867

(continued...)

The FCC has also relied upon the savings clause in holding that the FCA preserves the rights of parties to pursue legal remedies against telecommunications companies based on state statutory or common law claims, including claims for false advertising, fraud, and misrepresentation. See Richman Bros. v. U.S. Sprint Comms. Co., 10 F.C.C.R. 13639, 13641-42 (1995); In re Operator Servs. Providers of Am., 6 F.C.C.R. 4475, 4477 (1991).

Reading the "other terms and conditions" clause of § 332(c)(3)(A) in conjunction with the FCA's savings clause demonstrates that Congress intended that the preemptive reach of § 332(c)(3)(A) *not* extend to state law claims for false advertising and fraud. Tenore, 136 Wash.2d at 349, 962 P.2d at 117. In Bennett v. Alltel Mobile Communications, 1996 WL 1054301 (M.D. Ala. 1996), the plaintiff alleged that Alltel, a wireless telephone service provider, misrepresented and failed to disclose its practice of rounding up charges for airtime used to the next full minute. Upon reviewing both § 332(c)(3)(A) and the savings clause, the court held that the case could proceed in state court, finding "that [when] Congress enacted the savings clause, it obviously thought that state courts could adequately handle matters in this area." Id. at *6.

Finally, depriving state courts of their full range of remedies to punish unfair business practices committed by wireless telephone companies is directly contrary to § 332's purpose.

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[10](...continued)
F.Supp. 1511, 1516 (D. Utah 1994) (state remedies not in conflict with the FCA are preserved by § 414); Financial Planning Institute v. AT&T Corp., 788 F.Supp. 75, 77 (D. Mass. 1992) ("[B]y enacting the savings clause, Congress specifically provided for the preservation of existing statutory and common law claims in addition to federal causes of action.").

By ending federal rate regulation and preempting "state rate and entry regulation of all commercial mobile services," Congress intended for § 332 "[t]o foster the growth and development of mobile services that, by their nature, operate without regard to state lines as an integral part of the national communications infrastructure . . ." H.R. Rep. No. 103-111, 103rd Cong., 1st Sess. 211, 260, reprinted in 1993 U.S.C.C.A.N. 378, 587. "Fostering economic growth" was the guiding principle in the FCC's implementation of § 332. Implementation Order, 9 F.C.C.R. 1411, at ¶ 18.

State law claims proscribing false advertising and protecting consumers are in harmony with this federal policy. See Bennett, 1996 WL 1054301 at *5. They provide a necessary counter weight against the economic self-interest of the dominant wireless provider in each market to engage in anti-competitive conduct at the expense of new, less established entrants, thereby raising prices, eliminating jobs and constricting the wireless telephone industry in the long run. A wireless company that gains market share through false and deceptive advertising subverts the objective of § 332 that the driving economic forces in the industry should be "technological innovation, service quality, competition-based pricing decisions, and responsiveness to consumer needs." Implementation Order, 9 F.C.C.R. 1411, at ¶ 19.

Further, permitting plaintiffs to assert, without limitation, their claims for false advertising is necessary to prevent creating a void between the zones of permissible federal and state regulation over the wireless telephone industry. The FCA imposes no duty on telecommunications companies, including wireless telephone providers, "to make accurate and authentic representations in their promotional practices." Weinberg v. Sprint Corp., 165 F.R.D. 431, 438 (1996). See DeCastro,

935 F. Supp. at 550. Nor are any remedies provided under the FCA for dishonest promotions and deceptive marketing practices. Bauchelle v. AT&T Corp., 989 F. Supp. 636, 645 (D.N.J. 1997). Accordingly, state law claims provide the only effective mechanism for deterring wireless telephone companies from engaging in false advertising.

In summary, while § 332(c)(3)(A) bars state regulation of the entry and rates charged by wireless telephone providers, claims challenging the fairness of consumer advertising practices remain within the jurisdiction of state courts, and are consistent with the Congressional purpose for enacting § 332.

2. The Overwhelming Weight Of Authority Holds That The FCA Does Not Preempt The State Law Claims Plaintiffs Have Alleged.

Federal and state courts recognize that judicial oversight of claims for the failure to disclose deceptive practices would not require the court to engage in rate-setting.[11/] The Sixth Circuit Court of Appeals held that state law claims for fraud and deceit arising from a carrier's failure to disclose charges for uncompleted calls did not conflict with the FCA nor "require agency expertise for their treatment and are 'within the conventional experience of judges.'" In re Long Distance Telecomms. Litig., 831 F.2d 627, 633 (6th Cir. 1987), quoting Far East Conference v. United States, 342 U.S. 570, 574 (1952).

The plaintiff in Weinberg, 165 F.R.D. at 434, asserted that the defendant used deceptive and misleading advertising and promotional

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[11/] FCC rate regulation is a highly complicated procedure, dependent, in part, upon estimating operating costs, tax rates, financing necessary for investments in capital equipment, depreciation, inflation and interest rates. See Illinois Bell Tel. Co. v. FCC, 988 F.2d 1254, 1258-59 (D.C. Cir. 1993). None of these factors would be considered in imposing damages for false advertising.

practices that did not disclose its practice of "rounding up" the time charged to the next full minute. The court concluded,

> The suit does not challenge Sprint's provision of services or its tariff rates, nor does it dispute the calculation of those rates. Instead, plaintiff's state law claims relate to Sprint's advertising practices.

165 F.R.D. at 438.

In Bruss Co. v. Allnet Comm. Services, 606 F. Supp. 401 (N.D. Ill. 1985), plaintiffs brought a class action alleging that defendant overcharged long-distance subscribers. The court held that none of plaintiff's common law fraud and statutory deceptive practices claims "conflicts with provisions of the Communications Act or interferes in any way with the regulatory scheme implemented by Congress." Id. at 411.

Similarly, in Kellerman v. MCI Telecomms. Corp., 493 N.E. 2d 1045, 1051, cert. denied, 479 U.S. 949 (1986), plaintiffs brought suit against their long distance carriers for breach of Illinois' consumer fraud and deceptive trade practice acts, alleging that defendant's advertising practices constituted breach of contract and common-law fraud. The court found that plaintiffs were attempting to hold the defendant to the same standards as any other business that engages in false advertising, and held:

> The prosecution of these claims will in no way interfere with the delivery of long-distance telephone service to defendant's customers, and any possible effect the litigation could have on defendant's telephone rates is speculative at best. Finally, no Federal statute or regulation has been brought to our attention which would expressly prohibit these actions.

493 N.E. 2d at 1052.

After the 1993 amendment to § 332, federal courts have uniformly held that state claims seeking redress from wireless telephone service providers for a defendant's false advertising practices under state consumer protection statutes *are not* preempted. In Bennett, 1996 WL 1054301 at *2, the plaintiff challenged a wireless telephone service provider's failure to disclose its practice of rounding up charges for airtime. The court observed that "a commonsense reading of the complaint in this case suggests that *the state law claims relate to the failure to disclose rather than rates or service*." Id. at *5 (emphasis added). The court specifically rejected the argument that LA Cellular and AT&T Wireless make here:

> Clearly, Congress could have completely preempted state law by stating that § 332(c)(3)(A) would preempt any state law that related to the rates charged by commercial mobile service providers, if it so desired. However, Congress chose to only prohibit the regulation of those rates by the states. In fact, § 332(c)(3)(A) does not seek to vindicate the same interests upon which plaintiff's state cause of action seeks relief. [Citation omitted.] Here, the plaintiff is not contesting the rate charged, but rather is challenging Alltel's failure to disclose in its contract with consumers its practice of "rounding up" charges for airtime. Hence, this action will not affect the rates charged; instead, it may, depending on the outcome, affect the disclosure of the rates charged.

Id. at *4.

The court also rejected defendant's argument that the claims for monetary relief were preempted by federal law:

> The court finds that the *relief sought in the form of a refund* in the difference between the

> amounts charged and amount consumers allegedly thought they were being charged does not confer the court with federal-question jurisdiction *in that it does not relate to the rate charged or services provided, particularly when a commonsense reading of the complaint reflects the pleading of state law claims.*

Id. at *3 (emphasis added).

Finally, the federal district courts in Sanderson, 958 F. Supp. at 960, In re Comcast, 949 F. Supp. at 1200, and DeCastro, 935 F. Supp. at 553, each held that a claim based upon false advertising brought under the applicable state consumer protection statute was not preempted by § 332(c)(3)(A).

The most comprehensive discussion of the issue raised here is set forth in the opinion issued last September by the Washington Supreme Court in Tenore v. AT&T Wireless Services, 136 Wash.2d 322, 962 P.2d 104 (1998), cert. denied, 119 S. Ct. 1096 (Feb. 22, 1999). In Tenore, the Court reviewed the text of § 332(c)(3)(A), its legislative history, relevant FCC reports, and all leading authorities. The Tenore Court unanimously rejected the same preemption argument raised in this action by LA Cellular and AT&T Wireless.

Plaintiffs alleged that the wireless telephone provider in Tenore, and a defendant here, AT&T Wireless, failed to disclose in its advertising that it rounded airtime charges up to the nearest minute. Plaintiffs asserted common law claims for negligent misrepresentation and fraud and for violation of the Washington Consumer Protection Act.

The Tenore Court rejected AT&T Wireless' contention that claims of false advertising were within the special expertise of the FCC, and thereby preempted, concluding:

> [T]here is no conflict between the authority of the FCC and that of a court in deciding whether AT&T's advertising practices are misleading. As in Nader [v. Allegheny Airlines, 426 U.S. 290 (1976)], Appellants in this case do not challenge the reasonableness of AT&T's underlying practice of rounding its call charges. Also, although the FCC enacted the preemption provision in Section 332 to promote uniformity, it did so primarily to prevent burdensome and unnecessary state regulatory practices, and not to subject the CMRS [commercial mobile radio service] infrastructure to rigid control. Nor does the FCC have exclusive authority over advertising and billing practices, if at all.

136 Wash.2d at 347, 962 P.2d at 116.

The Washington Supreme Court similarly rejected AT&T Wireless' argument that an award of damages would require the court to engage in rate regulation in conflict with § 332(c)(3)(A). On this issue the Court found the reasoning and conclusions of Nader v. Allegheny Airlines, 426 U.S. 290 (1976), particularly persuasive. In Nader, the plaintiff was "bumped" from his reserved seat because an airline had overbooked its flights as part of a practice of deliberate overbooking. The plaintiff contested the *nondisclosure* of the overbooking, not the practice itself. The airline claimed that any action for damages for misrepresentation would, in effect, be an attack on the reasonableness of federally regulated rates. The United States Supreme Court, however, concluded that the action "does not turn on a determination of the reasonableness of a challenged practice." Id. at 305. Further, any "impact on rates that may result from the imposition of tort liability . . . would be merely incidental." Id. at 300. Accordingly, the Tenore Court held:

> There is sufficient reliable authority for this Court to conclude that the state law claims brought by Appellants and the damages they seek do not implicate rate regulation prohibited by Section 332 of the FCA. The award of damages is not per se rate regulation, and as the United States Supreme Court has observed, does not require a court to "substitute its judgment for the agency's on the reasonableness of a rate." [Nader v. Allegheny Airlines, 426 U.S. 290, 299 (1976).] Any court is competent to determine an award of damages.

136 Wash.2d at 344-345, 962 P.2d at 115.

An opinion filed March 16, 1999, by the District of Columbia Circuit in Cellular Telecomms. Ind. Ass'n v. FCC, 168 F.3d 1332, 1336 (D.C. Cir. 1999), is instructive and supports the narrow interpretation of § 332(c)(3)(A) consistent with the wording of the statute itself and its legislative history. In that case, the issue for determination was whether a Texas law requiring all providers of telecommunications services, including wireless telephone companies, to contribute to state-administered universal service funds, constituted rate regulation under § 332. The FCC concluded that the "rates charged by" language of § 332(c)(3)(A) solely prohibited "states from prescribing, setting or fixing rates" of wireless telephone providers, none of which the FCC contended the Texas law accomplished. In re Pittencrieff Comms., 13 F.C.C.R. 1735, 1737, 1745 (1997).

The appellate court confirmed the propriety of the FCC's determination:

> Here the idea is that the Texas contribution requirements are impermissible rate regulation because they increase the wireless service provider's cost of doing business in the state and thus impact the rates charged to customers. One

> might say the same about local siting law or *state consumer protection laws*. They too increase the cost of doing business. Yet a House Committee cited these laws as examples of the variety of permissible regulation of the "other terms and conditions." See H.R. Rep. No. 103-111, at 261 (1993), reprinted in 1993 U.S.C.C.A.N. 378, 588. The Commission offered other such examples, including some drawn from its previous decisions. *To equate state action that may increase the cost of doing business with rate regulation would, the Commission reasonably concluded, forbid nearly all forms of state regulation*, a result at odds with the "other terms and conditions" portion of the first sentence.

168 F.3d at 1336 (emphasis added).[12/]

Also instructive is Esquivel, 920 F. Supp. at 714. In that case, wireless telephone providers relied upon § 332 in arguing that plaintiffs could not sue under Texas common law in order to limit the amount of liquidated damages stipulated within defendants' service agreement for early customer termination. The court found that the purpose of the Texas law was "to protect consumers from excessive liquidated damages provision that are tantamount to penalties," and held that this purpose was in accord with the "other consumer protection matters" under state law that were not preempted by § 332(c)(3)(A). Id. at 716.

[12/] Pittencrieff relied upon an earlier FCC ruling of Petition of the Connecticut Dep't of Public Utility Control, 10 F.C.C.R. 7025, 7061 (1995), aff'd sub nom., Connecticut Dep't of Public Utility Control v. FCC, 78 F.3d 842 (2d Cir. 1996), in which the FCC found that § 332(c)(3)(A) did not preempt all state regulatory activities, including requiring informational filings and conducting complaint proceedings relating to customer billing information and practices and other consumer matters. Id. at 7060-7061.

The trial court herein cited no case law in support of its orders. In their papers, LA Cellular and AT&T Wireless relied primarily upon two decisions: Day v. AT&T Corp., 63 Cal. App. 4th 332 (1998) and In re Comcast Cellular Telecom. Litigation, 949 F. Supp. 1193 (E.D. Pa. 1996). Both are distinguishable, and Day had no discussion whatsoever of § 332.

In Day, plaintiffs alleged that AT&T Corporation and Sprint Communications, both long distance common carriers that sold prepaid phone cards in several minute blocks, engaged in misleading and deceptive advertising because the advertising and packaging materials for the cards did not reveal that charges for all calls were rounded up to the next full minute. Day permitted plaintiffs' case to proceed and to seek injunctive relief, but held that an award of restitution under the Bus. & Prof. Code §§ 17200, et seq. and §§ 17500, et seq., impinged upon *tariffs* defendants had filed with the FCC and, thus, was barred under the filed rate doctrine. 63 Cal. App. 4th at 339.

As noted supra, at 25-26, commencing in 1993, Congress and the FCC revolutionized the regulatory scheme for the wireless industry. Today, market competition alone determines the reasonableness of rates charged by wireless telephone providers. This understanding is critical to analyzing Day. The defendants in Day were traditional land line telephone companies, the reasonableness of whose rates were subject to regulatory oversight and review, unlike the "hands-off" regulatory scheme that has been applied to the wireless industry. As § 332 is relevant only for wireless telephone companies, *there was no mention of § 332* in Day. Instead, Day's holding depended the Court's analysis of the filed-rate doctrine which has

no applicability to the wireless industry wherein there are no filed rates. As the Court acknowledged in the *first* paragraph of the opinion:

> Respondents, who include two providers of telephone serves and four nonprovider phone card retailers, successfully demurred to appellants' first amended complaint on the ground that the action was barred by the filed rate doctrine. This doctrine, which will be discussed in greater detail presently, derives from the requirement contained in the Federal Communications Act that common carriers, such as AT&T [Corporation], file with the Federal Communications Commission (FCC) and keep open for public inspection "all charges (and the) classifications, practices, and regulations affecting such charges." (47 U.S.C. § 203(a).)

63 Cal. App. 4th at 328.

The filed-rate doctrine has been patterned on statutes and case law developed for heavily regulated industries and utilities. See AT&T Co. v. Central Office Tel., 524 U.S. 214, 118 S.Ct. 1956, 1962 (1998). The doctrine seeks to preserve the regulating agency's primary jurisdiction to determine the reasonableness of rates (safeguards agency autonomy) and ensure that only those rates approved are charged (guarantees nondiscriminatory rate setting). Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571, 577-78 (1981); Day, 63 Cal. App. 4th at 335. In application, the filed-rate doctrine "insulates from judicial challenge the rate filed by common carriers with the FCC and prohibits courts from awarding relief that would impose upon a carrier any rate other than that filed with the FCC." Weinberg, 165 F.R.D. at 438 n.5.

By virtue of the filed rate doctrine, consumers in Day were charged with *constructive knowledge* of the provisions of the tariff which

disclosed defendants' practice of rounding up. Therefore, it was determined that *as a matter of law* defendants had not deceived any consumers and there were no ill-gotten gains to be disgorged. Even if the phone cards at issue were advertised falsely, "[t]he filed tariffs [for the phone cards disclosed] the practice of rounding up," and, thus, "members of the public received *exactly what they paid for*." 63 Cal. App. 4th at 339 (emphasis in original). To avoid misinterpretation, the court took the unusual step of repeating its analysis:

> To summarize, the notion of restoring something to a victim of unfair competition includes two separate components. The offending party must have obtained something to which it was not entitled *and* the victim must have given up something which he or she was entitled to keep. *Because the filed rates charged by respondents are presumptively correct*, a consumer who uses a pre-paid phone card obtains the full value of what was paid for and therefore has given up nothing, regardless of whether he or she was improperly induced to purchase the card in the first place.

Id. at 340 (emphasis added).

Accordingly, the factual predicate (land line companies that file their rates with the FCC) and the legal construct (the filed-rate doctrine) of Day's holding are wholly irrelevant to this case. LA Cellular and AT&T Wireless are not required to file tariffs with the FCC, and may not rely upon case law developed under the filed-rate doctrine to deny plaintiffs the full range of remedies provided under California law for false advertising. As explained in Tenore,

> [N]ot only are there no tariffs on file, but the two purposes behind the 'filed rate' doctrine — preserving an agency's primary jurisdiction to

> determine the reasonableness of rates and insuring that only those rates approved are charged — do not apply [to wireless telephone providers].

Tenore, 136 Wash.2d at 334, 962 P.2d at 110.

The other case on which LA Cellular and AT&T Wireless primarily relied for their motion to strike was In re Comcast, 949 F. Supp. at 1193. Comcast is factually distinguishable from the present action, and its holding was rejected in two companion cases. AWACS, Inc., doing business as Comcast Metrophone ("Comcast"), was a wireless telephone provider in several Eastern states that charged subscribers for the time from when a call was initiated to the time when the call was answered by the recipient. Comcast's practices resulted in lawsuits filed against it in Pennsylvania, In re Comcast; New Jersey, DeCastro, 935 F. Supp. at 541; and Delaware, Sanderson, 958 F. Supp. at 947.

All three cases concerned the propriety of Comcast's removal of the suits to federal court. Plaintiffs in each case filed similar complaints alleging violations of state unfair business practices, breach of contract, breach of the implied duty of good faith and fair dealing, and unjust enrichment by billing for the non-communication time. Sanderson, 958 F. Supp. at 951. Comcast argued in each case that the plaintiffs' claims were preempted by § 332, arguing that the plaintiffs' cases in substance took issue with the reasonableness of its billing practices, not its *advertising* concerning its billing practices. Sanderson, 958 F. Supp. at 954; In re Comcast, 949 F. Supp. at 1199; DeCastro, 935 F. Supp at 541.

In In re Comcast, the court agreed with Comcast's argument with respect to the plaintiffs' claims for breach of the implied covenant of good faith and fair dealing and for unjust enrichment, finding these claims

"present[ed] a direct challenge to the reasonableness of Defendant's billing practices." Id. at 1200.[13/] Notably, however, the court found that claims for unfair business practices and breach of contract were not preempted. Id.

In DeCastro, the court reached the opposite holding on the claims for breach of the implied covenant of good faith and fair dealing and for unjust enrichment. DeCastro refused to recharacterize these claims as federal common law claims:

> [W]hile it may be true that Congress intended claims against telecommunications providers directly challenging the provider's rates or entry into the market to be completely preempted, the claims in Counts III and IV [breach of the implied duty of good faith and fair dealing and unjust enrichment] in this case challenge a billing practice, not a rate or market entry.
>
> . . . [The Court finds] persuasive those cases holding that the Communications Act does not displace, but rather supplements, state law claims against cellular telephone service providers for consumer fraud, misrepresentation, breach of contract, and unfair billing practices.

935 F. Supp. at 553-554.

The final case in this trilogy is Sanderson, 958 F. Supp. at 947, in which the Court had the benefit of the competing companion

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[13] In large part, the error committed by the trial court can be explained by the fact that LA Cellular and AT&T Wireless succeeded in persuading the trial court by means of a similar argument. Defendants convinced the trial court that plaintiffs' case was a direct attack on the quality of LA Cellular's telephone services. This Court should not be so misled. Plaintiffs have not alleged any cause of action for poor or deficient cellular telephone services. Whether LA Cellular's service area contains coverage gaps is a relevant evidentiary issue, but only because LA Cellular's advertises a "seamless calling area" throughout Southern California.

decisions in DeCastro and In re Comcast. Sanderson directly rejected the reasoning of In re Comcast:

> [T]his Court respectfully disagrees with the court in the Pennsylvania companion case, and holds that Sanderson's claims cannot be recharacterized as arising under federal common law.

958 F. Supp. at 960. Sanderson concluded that the breach of implied duty of good faith and fair dealing and unjust enrichment claims did not challenge the reasonableness of Comcast's billing practices and, thus, were not preempted by § 332(c)(3)(A). Id. at 956-57.

Ultimately, there is no need to determine whether In re Comcast or DeCastro and Sanderson are better reasoned decisions. In contrast to the Comcast cases, plaintiffs' allegations of false advertising are unrelated to LA Cellular's rates or its disclosures concerning its billing practices. At trial, plaintiffs will demonstrate that LA Cellular advertises and represents that it provides customers with a "seamless" calling area throughout Southern California. Next, plaintiffs will show that undisclosed gaps, holes or "dead zones" exist within LA Cellular's calling area, for the trier of fact to reach the ultimate conclusion that LA Cellular's advertisements and representations are inaccurate, misleading and intentionally deceptive. This is a classic case of false advertising. If liability is established, an award of monetary relief would not require a court to prescribe, set or fix wireless telephone rates.

3. Considering Whether Plaintiffs' Claims For Restitution Measured As The Wrongdoer's Ill-Gotten Profit Are Preempted Particularly Demonstrates That The Trial Court Erred.

The error committed by the trial court is particularly apparent when one considers whether plaintiffs' claims for violation of the Unfair Competition Law, Bus. & Prof. Code §§ 17200, et seq., and the Deceptive, False and Misleading Advertising Statute, Bus. & Prof. Code §§ 17500, et seq., and the remedy permitted thereunder, restitution, measured by defendants' ill-gotten profits, are preempted on the theory that an award of profits would require a trial court to set wireless telephone rates. In the simplest terms, an award of profits will not require the trial court to engage in rate-setting.

The remedies under the Unfair Competition Law, Bus. & Prof. Code § 17203, and the Deceptive, False and Misleading Advertising Statute, Bus. & Prof. Code § 17535, are generally limited to restitution, measured by the defendants' profits earned from their unfair business practice, and injunctive relief, and do not include compensatory damages. See Stop Youth Addiction v. Lucky Stores, 17 Cal. 4th 553, 581 (1998) (Baxter, J. concurring); Bank of the West v. Superior Court, 2 Cal. 4th 1254, 1266 (1992). Less than a month ago, the California Supreme Court reiterated these principles in holding that LA Cellular is subject to the Unfair Competition law for allegedly seeking to destroy competition in the Los Angeles cellular telephone equipment market. Cel-Tech Comms. v. LA Cellular, 20 Cal.4th 163, 83 Cal. Rptr. 2d 548 (Apr. 8, 1999).

Requiring LA Cellular and AT&T Wireless to disgorge their profits would not in any way necessitate the prescribing, setting or fixing of wireless telephone rates, even if theoretically the court awarded restitution

equivalent to all of LA Cellular's profits. There is no "upper limit" on the amount of profits that must be disgorged for committing unfair business practices. In an analogous decision reviewing a Federal Trade Commission order, the Ninth Circuit Court of Appeals "rejected the contention that restitution is available only when the goods purchased are essentially worthless." Federal Trade Commission v. Figgie Intern'l, 994 F.2d 595, 606 (9th Cir. 1993) (internal quotation omitted).

California law authorizes plaintiffs to seek "disgorgement of all profits defendants received as a result of their acts of unfair competition." ABC Int'l Traders v. Matsushita Elec. Corp. of Amer., 14 Cal. 4th 1247, 1253 (1997). In People v. Thomas Shelton Powers, 2 Cal. App. 4th 330 (1992), for example, the court held that the remedy of restitution was not limited to restoring to a victim money or property wrongfully taken, and that even in the absence of proof of any detriment caused to the class, the court could order restitution measured by the benefit, specifically profits, conferred on the perpetrator of the wrongdoing.[14/]

In summary, there is no conflict between granting plaintiffs the full remedies permitted under § 17200 and § 17500 and § 332(c)(3)(A). Awarding plaintiffs the defendants' profits will *not* set or fix LA Cellular's rates. Rather, it is a court's duty to craft a measure of restitution so that the California law may be enforced according to its terms. See Mangini, 7 Cal.4th at 1072. "'[T]he necessity of deterring future acts require[s] that the wrongdoer be prevented from retaining the illegal profits.'" ABC Int'l

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[14/] An award of disgorgement for less than all of its profits also would not require the court to engage in setting wireless telephone rates. For example, the trial court could require LA Cellular to disgorge its profits derived from new and renewing subscribers which were generated by its false and deceptive advertisements.

Traders, 14 Cal. 4th at 1270, quoting Tomas Shelton Powers, 2 Cal. App. 4th at 343. The Court further explained:

> . . . [I]t is unlikely the legislature, in providing courts with broad equitable powers to remedy violations under Section 17203, intended those powers be limited in an illogical, unfair and counterproductive manner. As the Attorney General explains, '[o]ften, no logical connection exists between an order of restitution or disgorgement of past illicit gains and an injunction addressing future conduct . . . . In all of these cases . . . the offender is not entitled to keep the fruits of its unfair, deceptive or unlawful conduct. The defendant's victims may be entitled to restitution, and the court may also conclude that deterrence is more effectively accomplished through restitution than through an injunction of little practical significance.'

ABC Int'l Traders, 14 Cal. 4th at 1270-71 (quoting Attorney's General's Amicus Curiae brief).

4. Awarding Punitive Damages Will Not Require The Court To Regulate Wireless Telephone Rates.

Plaintiffs' claims for punitive damages are similarly unaffected by § 332. Plaintiffs sought punitive damages for violation of the Consumer Legal Remedies Act, Civil Code §§ 1750, et seq., and for common law fraud.

Punitive damages are measured by looking to the profits earned by defendant or its net worth. See Civil Code § 3295 (allowing admission of evidence of the defendant's *profits and/or financial condition* after a determination that a defendant is guilty of malice, oppression, or fraud). Moreover, punitive damages have been allowed on an award of restitution, even without an award of compensatory damages. Millar v.

James, 254 Cal. App. 2d 530, 533 (1967). Consequently, just as an award of restitution measure by defendants' ill-gotten profits would not be tantamount to the setting of wireless telephone rates, neither would an award of punitive damages require the trial court to prescribe, set or fix wireless telephone rates.

IV. CONCLUSION

Plaintiffs respectfully submit that this petition presents a matter of first impression that raises important issues of public policy. Resolution by immediate review is necessary to ensure that plaintiffs are accorded the opportunity to present their claims effectively and to provide California consumers the same rights and remedies against wireless telephone companies for false advertising that are afforded consumers in other states.

By holding that any award of monetary relief would constitute rate regulation, the trial court has, in substance, barred nearly all state law claims against wireless service providers, in contravention of § 332(c)(3)(A)'s express language and of Congress' intent. Absent reversal, one the fastest growing industries in California will have taken a large step towards achieving by judicial rule making that which has been unable to obtain through its extensive lobbying activities before Congress, the FCC and the California state legislature: effective immunity from prosecution for false and deceptive advertising under state consumer protection statutes and common law claims.

DATED: May 6, 1999

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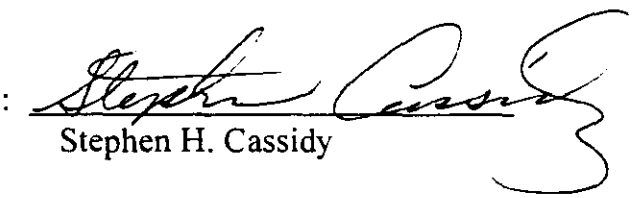
By: 
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IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT,
DIVISION __
No. B_____

Marcia Spielholz, Debra Petcove and the Wireless Consumers' Alliance

Petitioners,

vs.

The Superior Court of Los Angeles County

Respondent,

Los Angeles Cellular Telephone Company and AT&T Wireless Services, Inc.

Real Parties in Interest.

From the Superior Court For Los Angeles County, Case No. BC186787
Wendell Mortimer, Jr., Judge

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I am employed in the County of San Francisco, State of California. I am over the age of eighteen (18) years and not a party to the within action; my business address is 275 Battery Street, San Francisco, California 94111-3339.

I am readily familiar with Lieff, Cabraser, Heimann & Bernstein, LLP's practice for collection and processing of documents for service via overnight mail, and that practice is that the documents are delivered in-hand to an authorized overnight mail carrier the same day as the date listed on this Proof of Service.

On May 6, 1999, I served the within document(s) described as:

1. **PETITION FOR WRIT OF MANDATE OR OTHER EXTRAORDINARY RELIEF; MEMORANDUM OF POINTS AND AUTHORITIES;**
2. **PETITIONERS' APPENDIX OF NON-CALIFORNIA AUTHORITIES (VOL. I AND VOL. II);**
3. **PETITIONERS' EXHIBITS IN SUPPORT OF PETITION FOR WRIT OF MANDATE (VOL. I AND VOL. II); and**
4. **PROOF OF SERVICE BY OVERNIGHT MAIL**

on the persons listed below by overnight mail addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct.

Executed at San Francisco, California on May 6, 1999.

KEAKA LOO